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No. 10-373

Supreme Court, U.S.
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In The

Supreme Court of the United States

KIM IANN MANNING,

Petitioner,

v.

AMERICAN REPUBLIC INSURANCE CO.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

OPPOSITION BRIEF OF RESPONDENT AMERICAN REPUBLIC INSURANCE CO.

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QUESTIONS PRESENTED

A. Whether the administrator for Respondent's short-term disability plan abused her discretion by denying Petitioner's request for benefits when, contrary to the plan language, that request was not supported by any objective medical evidence.

B. Whether Respondent terminated Petitioner's employment in retaliation for Petitioner seeking short-term disability benefits or otherwise interfered with Petitioner's rights under ERISA.

CORPORATE DISCLOSURE STATEMENT

American Enterprise Group owns ten percent (10%) or more of the stock of Respondent American Republic Insurance Company.

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INTRODUCTION

The undisputed facts of this case show that after working for Respondent American Republic Insurance Company ("ARIC") for a total of fifty days, Manning filed a claim for short-term disability ("STD") benefits maintaining that she was unable to work due to persistent hypertension (high blood pressure), migraine headaches, and anxiety. Four months later, the plan administrator of ARIC's STD plan denied Manning's claim because the claim was not supported by any objective medical evidence.

During those intervening months, Manning remained away from work, yet she was unable to produce medical evidence establishing that any of the conditions from which she claimed to suffer prevented her from returning to work. Even more telling, Manning never sought medical attention during those four months and she saw her treating physician only once, and that was at the insistence of ARIC.

Manning's Petition for Certiorari stands on the same tenuous ground as her earlier efforts to overturn the plan administrator's decision. Despite her claims to the contrary, Manning's Petition does not raise any important or novel issues of federal law. Furthermore, the Eighth Circuit's decision is consistent with this Court's existing ERISA case law and with decisions issued by the other circuit courts of appeals. For those reasons, this Court should deny Manning's Petition for Writ of Certiorari and put an end to this prolonged saga.

STATEMENT OF THE CASE

A. Undisputed Facts.

The Eighth Circuit Court of Appeals' Decision affirming the Plan Administrator's determination discusses in detail the facts relevant to Manning's Petition. A summary of those facts is set forth below.

ARIC offers a self-funded short-term disability plan to its employees. Under the terms of its plan, employees who are unable to work due to a medical condition are eligible to receive benefits for "up to 170 calendar days in any one year." (App. 74).[1] To receive benefits, an employee claiming to be disabled must, among other things, have a "Medically Certified Health Condition" that lasts longer than the plan's waiting period. (App. 75, 323). To establish he or she has a Medically Certified Health Condition, an employee must, among other things, provide certification from an Approved Health Care Provider[2] that he or she has a "disabling . . . medical event" that prevents the employee from performing "some or all of [the employee's] regular job duties," and that is "[d]ocumented by disabling signs and symptoms." (App. 75, 323).

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[1] All citations to the record are to the Joint Appendix that was filed with the Eighth Circuit Court of Appeals.

[2] The plan defines an "Approved Health Care Provider" as a "doctor of medicine or osteopathy . . . ," a "podiatrist, dentist, Ph.D. psychologist, optometrist or chiropractor . . . ," and a "nurse practitioner or nurse midwife. . . ." (App. 75).

Manning began working for ARIC as a senior account specialist on January 31, 2005. (App. 139-41, 245). Her job was sedentary in nature and entailed contacting prospective customers, providing quotes on insurance products, and engaging in other sales activities. (*Id.*) Manning worked a total of 50 days for ARIC. The last day Manning actually worked was April 26, 2005. (App. 112-30, 248).

On May 9, 2005, Manning submitted a claim for short-term disability benefits under ARIC's short-term disability plan. (App. 88-91). The claim form Manning submitted was completed four days earlier by Andra Kennedy, a physician's assistant. In the form, Kennedy reported that Manning had "multiple issues which have contributed to her present health condition (i.e., elevated blood pressure, increased frequency of migraines, increased anxiety)." (App. 88). Without providing any specifics, Kennedy recommended "short-term disability for two-three months and re-evaluate condition at that time." (*Id.*) On the form she submitted, Manning alleged she was disabled since April 27, 2005. (*Id.*).

The claim form Manning submitted did not contain sufficient information for ARIC to determine if Manning's purported "elevated blood pressure, increased frequency of migraines, increased anxiety" constituted a disabling medical event under the plan's terms. Further, a physician's assistant is not an Approved Health Care Provider under the terms of the plan and cannot certify that a given condition constitutes a Medically Certified Health Condition.

For the next three months, ARIC worked with Manning to obtain additional information in support of her claim for STD benefits. ARIC's efforts included repeated requests, both written and oral, that Manning provide ARIC with objective medical evidence to support the claim that she could not work due to hypertension, migraine headaches, and increased anxiety. Further, Manning was specifically advised, in writing, that objective medical evidence included "data and records from your attenting [sic] Approved Health Care Provider, narrative reports, x-rays, and laboratory findings and consulting Approved Health Care Provider reports." (App. 100-101). On July 29, 2005, ARIC representatives spoke to Dr. Kenneth Moon, Manning's treating physician, who acknowledged that he had not seen Manning for over four months, and that he could not explain why Manning was unable to work. (App. 159, 162).

Despite the repeated chances ARIC gave Manning, the only objective medical evidence Manning furnished regarding the medical care and treatment she received were four blood pressure readings contained in progress notes Dr. Moon's practice prepared. (App. 134-35, 159, 183). Of the four blood pressure readings, only one reading can be reasonably characterized as high. That particular reading occurred, however, on April 26, 2005, during a period in which Manning independently decided to discontinue her blood pressure medication. Further, the progress note of Manning's final office visit with Dr. Moon (August 1, 2005) showed that Manning's blood

pressure on that day was an unremarkable 130/90 and that she "appear[ed] alert, cheerful, and in no acute distress." (App. 183).

On August 8, 2005, ARIC denied Manning's request for STD payments, and Manning timely appealed that decision seven days later. (App. 181, 195). On August 29, 2005, the plan administrator denied Manning's appeal. (App. 198-99). In her written decision, the plan administrator advised Manning that ARIC was denying her claim "due to lack of objective medical information" illustrating that Manning was "disabled from performing [her] job duties as defined by American Republic's short-term disability plan." (*Id.*) In addition, the letter gave Manning yet another opportunity to substantiate her claimed disability by providing ARIC with "objective medical information from your Approved Health Care Provider, that you are disabled from performing your job duties." (*Id.*). Manning never came forward with any additional medical information regarding her alleged disability.

The letter the Plan Administrator sent Manning denying Manning's appeal provided Manning with two options regarding her continued employment with ARIC. Those options were as follows: (1) return to work on August 30, 2005 with "certification from your Approved Health Care Provider that you are able to return to work," or (2) provide ARIC with "objective medical information, from your Approved Health Care Provider, that you are disabled from performing your job duties." (App. 198).

Manning did not provide any objective medical evidence supporting her claimed disability, and she advised ARIC that Dr. Moon would not allow her to return to work for at least thirty days. (App. 291-92). As a result, ARIC terminated Manning's employment effective August 31, 2005. (App. 384). As of that date, ARIC had provided Manning with four months of unpaid leave even though it was not obligated to do so under any applicable law or policy.

B. Proceedings Below.

After the plan administrator denied her appeal, Manning filed a lawsuit in the United States District Court seeking judicial review of that decision under applicable provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* In addition, Manning alleged ARIC terminated her employment in retaliation for her seeking STD benefits and that the termination of her employment prevented her from obtaining long-term disability benefits under a separate insurance policy, all in violation of Section 510 of ERISA, 29 U.S.C. § 1140. ARIC moved for summary judgment with respect to all three claims. The district court granted ARIC's motions in separate orders. (Pet. App. C); *Manning v. American Republic Insurance Co.*, 630 F.Supp.2d 1017 (S.D. Iowa 2009).

Manning appealed the district court's rulings to the Eighth Circuit Court of Appeals. In a unanimous decision issued on May 12, 2010, a panel of three

Eighth Circuit judges affirmed the district court rulings. The panel held, among other things, that the lower court properly concluded the plan administrator did not abuse the discretion afforded her under the terms of the STD plan in denying Manning's claim for STD benefits, and that the district court "properly held that ARIC's reason for terminating Manning's employment was not a pretext for retaliation or interference under ERISA." (Pet. App. A); *Manning v. American Republic Insurance Company,* 604 F.3d 1030, 1044 (8th Cir. 2010).

With respect to Manning's claim that the plan administrator abused her discretion by denying Manning's STD claim, the court found that the plan administrator reasonably interpreted applicable plan language as requiring claims to be supported by objective medical evidence. *Manning,* 604 F.3d at 1041-42. The court likewise concluded that the plan administrator did not abuse her discretion by determining that Manning's claim lacked the necessary objective medical support, stating in unequivocal terms that a "plan administrator is not required to order an IME when the claimant's evidence is facially insufficient to support a finding of disability." *Manning,* 604 F.3d at 1041 (citing *Rutledge v. Liberty Life Assurance Co. of Boston,* 481 F.3d 655, 661 (8th Cir. 2007)); *Layes v. Mead Corp.*, 132 F.3d 1246, 1251-52 (8th Cir. 1998).

Manning timely requested a rehearing by the panel and en banc review by the entire circuit.

Manning's requests were rejected in a two-sentence order dated June 17, 2010 (Pet. App. D).

REASONS FOR DENYING THE WRIT

A. The Eighth Circuit's decision does not conflict with any decision of this Court.

Manning's Petition requests this Court review two distinct issues. Although important to the parties, neither issue is novel or important, and, as the Eighth Circuit's well-reasoned and detailed opinion confirms, both issues have been litigated and relitigated and the applicable law with respect to each is both consistent and settled.[3]

Manning contends this Court should grant her Petition for Writ of Certiorari because, among other

[3] In her Petition, Manning also discussed her claim that the plan administrator's denial of Manning's claim for short-term disability benefits prevented her from seeking benefits under the long-term disability insurance coverage ARIC provides its employees. (Pet. 20-21). Manning does not, however, contend that the Eighth Circuit's denial of that claim conflicts with any decision of this Court or that the Eighth Circuit's ruling conflicts with any other circuit court decision. The Eighth Circuit correctly concluded that Manning failed to establish ARIC wrongfully interfered with any right she may have had to prospective long-term disability ("LTD") benefits noting that Manning "admitted that she was ineligible for long-term disability benefits because she was released to return to work in October 2005." *Manning*, 604 F.3d at 1044. *See also Feldman v. Am. Mem'l Life Ins. Co.*, 196 F.3d 783, 792 (7th Cir. 1999). Manning's arguments to the contrary are unavailing.

things, the Eighth Circuit's decision regarding her claim for STD benefits is, as she puts it, "at odds" with this Court's decision in *Black & Decker Disability Plan v. Nord,* 538 U.S. 822 (2003). Manning's argument misconstrues this Court's decision in *Nord* and the Eighth Circuit's decision below.

In *Nord,* this Court held that the "treating physician rule" that applied to disability determination under the Social Security Act, 42 U.S.C. § 231 *et seq.*, did not govern private benefit plans under ERISA. While recognizing that administrators of private benefit plans could not "arbitrarily refuse to credit a claimant's reliable evidence," this Court concluded that ERISA does not require plan administrators "to automatically accord special weight to the opinions of a claimant's physician," or to offer any explanation "when they credit reliable evidence that conflicts with a treating physician's evaluation." *Nord,* 538 U.S. at 834.

This Court's holding in *Nord* applies to situations where a claimant provides reliable evidence from a treating physician in support of his or her claim for benefits, but the plan administrator denies the claim based on other reliable medical information to the contrary. In those particular situations, *Nord* instructs that plan administrators may credit the contrary evidence and are not required "to accord special weight to the opinions of a claimant's physician; . . . " *Nord,* 538 U.S. at 834. This Court in *Nord* was not confronted with the issue this case presents; namely, whether a plan administrator may interpret

a plan's provisions as requiring a STD benefit claim to be supported by objective medical evidence and then reject any claim that fails to meet that requirement. The Eighth Circuit answered that latter issue in the affirmative; nothing in *Nord* compelled, or even suggested, a different conclusion.

Although Manning's arguments are not entirely clear, it appears Manning contends that the plan administrator's rejection of her STD claim conflicts with this Court's statement in *Nord* that plan administrators "may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinion of a treating physician." *Nord*, 538 U.S. at 834. Manning misreads that statement as essentially requiring plan administrators to either accept the opinion of treating physicians or require the claimant to undergo an independent medical evaluation. (Pet. 15). Manning misinterprets *Nord* as imposing such a rule no matter what the underlying plan language requires (in this instance, that STD claims be supported by objective evidence of disabling signs and symptoms) or how tenuous the treating physician's opinion.

The *Nord* language upon which Manning's argument appears to rest does not apply here because the plan administrator's rejection of Dr. Moon's opinions were, as the Eighth Circuit held, based on a reasonable reading of the applicable plan language and were not arbitrary in nature. *Manning*, 604 F.3d at 1039-1040. Likewise, and as the Eighth Circuit also held, Dr. Moon's unsubstantiated opinions were not "reliable" because his opinions were superficial and void of

any objective support. Further, Dr. Moon's opinions were directly contradicted by what limited medical evidence Manning did submit. That evidence showed Manning's purported high blood pressure, migraine headaches, and anxiety were all being controlled through medication and were not debilitating. *Id.* at 1040. As the court explained, "ARIC did not receive objective evidence of disabling signs and symptoms from Dr. Moon. Rather, Dr. Moon provided a subjective opinion, with no explanation regarding how Manning's condition might prevent her from performing her regular job duties, which ARIC had described in writing to Dr. Moon." *Id.*

Manning does not contend that the Eighth Circuit's decision affirming the lower court's dismissal of her Section 510 retaliation claim conflicts with any decision of this Court. As it stated below, the Eighth Circuit's decision on the retaliation issue is consistent with the decisions of this Court and the other courts of appeals.

B. The Eighth Circuit's decision does not conflict with any Circuit Court decision.

In addition to conflicting with this Court's decision in *Nord*, Manning contends the Eighth Circuit's decision is contrary to the decisions of its sister circuits, thus creating what Manning refers to as a "circuit split concerning the need to use actual evidence to rebut a treating physician's opinion." (Pet.

15). Manning cites five decisions where that rule has supposedly been applied. (Pet. 15-16).

The primary flaw in Manning's argument is that none of the decisions she cites in her Petition stand for the proposition that "actual evidence is needed to rebut a treating physician's opinion." Although each decision cites to *Nord* for the proposition that plan administrators "may not arbitrarily refuse to credit a claimant's reliable evidence, including the opinion of a treating physician," none of the decisions touch upon the specific issue for which Manning seeks this Court's review. Further, to the extent any of the cases apply, the cases are consistent with, and not contrary to, the Eight Circuit's decision affirming the denial of Manning's claim for STD benefits. *See also Huffaker v. Metro. Life Ins. Co.,* 271 Fed. Appx. 493, 500 (6th Cir. 2008) (plan administrator acted reasonably in rejecting claim for disability benefits because the claim was not supported by objective medical evidence); *Cooper v. Life Ins. Co. of North America*, 486 F.3d 157, 166 (6th Cir. 2007) ("Requiring a claimant to provide objective medical evidence of disability is not irrational or unreasonable.").

As an initial matter, in three of the five cases Manning cites in support of her claim that a split in the circuits exists, the court found the plan administrator did not abuse his or her discretion in denying a claim for disability benefits. Given that the plan administrator's decision was affirmed by the circuit court, it is difficult to see how any of those decisions can be contrary to the Eighth Circuit's determination or indicate a split in controlling authority. *See*

Gannon v. Metro. Life Insurance Co., 360 F.3d 211 (1st Cir. 2004) (holding defendant did not abuse its discretion by relying on medical evidence that was contrary to the opinions of two treating physicians, and stating "it is not our role to evaluate how much weight an insurer should have accorded the opinion of an independent medical consultant relative to the opinions of a claimant's own physicians"); *Leahy v. Raytheon Company*, 315 F.3d 11 (1st Cir. 2002) (plan administrator's determination that claimant was not fully disabled was supported by substantial evidence where plan administrators relied upon the results of independent medical record reviews and where the opinions of the claimant's treating physicians were mixed); *Jordan v. Northrop Grumman Corporation Welfare Benefit Plan*, 370 F.3d 869 (9th Cir. 2003) (plan administrator did not abuse discretion in denying claim for long-term disability benefits where claimant's "evidence that she was disabled was slight, and its reliability was questionable").

In the other two cases Manning cites, each court concluded that the denial of disability benefits constituted an abuse of discretion, but neither court held that a physician's opinion could only be rebutted through some type of medical review. Moreover, each case is distinguishable because, unlike Manning's STD claim, the benefits claim at issue in each case was supported by extensive and credible medical evidence that the plan administrator either ignored or discredited. *See Helms v. General Dynamics Corp.*, 222 Fed. Appx. 821, 823-26 (11th Cir. 2007) (plan administrator abused discretion in denying claim for

long-term disability benefits that was supported by extensive medical evidence including, but not limited to, notes of visits with a neurologist that described in detail the nature, severity, and frequency of the claimant's headaches, an MRI of the claimant's spine that revealed a slight disc bulge, and a Social Security Administration questionnaire where the claimant described "the daily difficulties he encountered"); *Calvert v. Firstar Finance, Inc.*, 409 F.3d 286 (6th Cir. 2005) (defendant abused discretion in denying long-term disability benefits where the denial was not based on a "reasoned and rational reading of the record before it," including "*objectively verifiable* determinations of the SSA and Calvert's treating physician") (emphasis original).

In contrast to the facts in *Helms* and *Calvert*, Manning provided only four blood pressure readings in support of her claim that she could not work due to hypertension, and "only one of the reports characterized Manning's blood pressure as high." *Manning*, 604 F.3d at 1040. Manning's "evidence" regarding the migraine headaches she purportedly endured was equally anemic. That evidence was limited to the progress notes Dr. Moon dictated. Those notes, while making sporadic mention to Manning's migraines, "did not address the nature, duration or severity of [Manning's] headaches, whether the migraines could be disabling over an extended period of time, or how they could render her unable to perform work of any kind." *Id.* Those facts readily distinguish this case from *Helms* and *Calvert*.

Manning contends the Eighth Circuit's rejection of her Section 510 retaliation claim is in conflict with the opinion of the Seventh Circuit Court of Appeals in *Lindemann v. Mobil Oil Corporation*, 141 F.3d 290 (7th Cir. 1998) and the Third Circuit Court of Appeals decision in *Kowalski v. L & F Products,* 82 F.3d 1283 (3rd Cir. 1996). In those cases, the courts suggested that requiring an employee to abandon his or her claim for disability benefits as a condition to returning to active employment presented the employee with a "Hobson's choice" that potentially violated Section 510.

The Eighth Circuit's decision does not conflict with *Lindemann* or *Kowalski* for the simple reason that the Eighth Circuit did not conclude, contrary to those decisions, that an employer could condition an employee's return to active employment on an employee's agreement to not seek disability benefits. Rather, the Eighth Circuit concluded, as did the district court, that while ARIC required Manning to provide a work release before returning to employment, it never once demanded Manning drop her STD claim as a precondition to returning to work. *Manning,* 604 F.3d at 1042-43 (observing that the letter Manning received on August 29, 2005 "by its own terms did not require Manning to make such a choice.") In addition, and as the Eighth Circuit also observed, citing and quoting *Lindemann*, "[S]ection 510 does not prevent ARIC from implementing and executing legitimate business interests under ERISA, such as terminating an employee due to job abandonment or excessive absenteeism." *Id.* at 1043. When ARIC

finally terminated Manning's employment, she had been absent from work, without any form of approved leave, for over five months.

The Eighth Circuit's decision was well-reasoned and fully supported by existing ERISA case law. None of the issues the court resolved against Manning conflicts with any decision of a sister circuit.

C. This case does not raise important or novel issues of federal law.

In her Petition, Manning argues that this case presents an important issue of federal law because the Eighth Circuit's decision, if left unchecked, will permit "lay" administrators of STD plans to ignore the judgment of treating physicians "thereby endangering the life and health of an employee,. . . ." Manning's argument misconstrues the Eighth Circuit's decision and, in so doing, creates a false concern.

In its decision, the Eighth Circuit held that the plan administrator did not abuse her discretion by requiring Manning to support her claim with objective medical evidence. The Eighth Circuit's decision was consistent with the plan's clear language and has no real implication beyond the specific facts of this case. Further, the Eighth Circuit's decision is consistent with established case law that grants employers "large leeway to design disability and other welfare plans as they see fit," *Black & Decker v. Nord,* 538 U.S. 822, 833 (2003), and that provides plan administrators with wide discretion to interpret the provisions of the plan employers design when those

plans so provide. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989).

Contrary to what Manning suggests, the Eighth Circuit's decision does not allow plan administrators to substitute their judgment for the judgment of treating physicians. Instead, the Eighth Circuit's decision, consistent with the applicable plan language, allows plan administrators to reject claims that are supported by opinion, but nothing else. The undisputed facts of this case clearly demonstrate that Manning's STD claim was denied because Manning failed to come forward with any objective evidence that she suffered from hypertension during the period for which she sought benefits or that any other medical condition precluded her return to active employment. The plan administrator did not substitute her judgment for Dr. Moon's judgment; rather she observed, as any lay person could, that Manning's claim was vacant.

Although matters involving small amounts can, at least in theory, raise important and novel issues of federal law that warrant this Court's review, it should be noted that despite all the attorney and court time it has consumed, Manning's claim for STD benefits involves, at most, three months of lost benefits.[4]

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[4] Because Manning elected a waiting period of sixty business days, any right Manning had to STD benefits did not take effect until late July 2005. Further, that right was extinguished in October 2005 when Dr. Moon released Manning to active employment.

Furthermore, if the Eighth Circuit erred in concluding the administrator for ARIC's STD plan abused her discretion by not requiring Manning to undergo an "independent medical examination" ("IME"), as Manning states in the Petition, the appropriate remedy would be to remand the case back to the plan administrator for further consideration, not to award Manning three months of STD benefits. *See Quinn v. Blue Cross and Blue Shield Ass'n,* 161 F.3d 472, 477-78 (7th Cir. 1998) (appropriate remedy was to remand case back to plan administrator where plan administrator failed to conduct proper investigation before denying claim); *Saffle v. Sierra Pacific Power Co.,* 85 F.3d 455, 460-61 (9th Cir. 1996) (remand to plan administrator was proper remedy where plan administrator denied benefits based on improper interpretation of plan's terms).

Manning's retaliation claim does not raise any important or novel issues of federal law. Similar to her STD claim, Manning's retaliation claim raises issues under Section 510 of ERISA that have been repeatedly litigated and now constitute settled law. Moreover, Manning's claim that ARIC's request that she provide it with a doctor's release before she returned to work provided her with a "Hobson's choice" is a false issue since ARIC never conditioned Manning's return to employment on her dropping her STD claim.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that the Supreme Court decline to review the questions presented by the Petitioners.

Respectfully submitted,

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